

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TEMPIE A. BELL and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Durham, NC

*Docket No. 03-1576; Submitted on the Record;  
Issued September 16, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that she no longer suffers from an injury-related lumbar strain.

On May 24, 2001 appellant, then a 36-year-old registered nurse, sustained an injury at work while lifting a patient from the floor. The Office accepted her claim for lumbar strain and paid compensation for temporary total disability on the periodic compensation rolls.

On November 28, 2001 the Office asked appellant's attending physician, Dr. J. Lawrence Frank, a Board-certified orthopedic surgeon, whether the accepted lumbar strain had resolved and if not, why it was taking so long when the usual recovery period for a strain was only a few months. Dr. Frank did not directly answer the questions put to him but did submit a January 22, 2002 treatment note and a January 21, 2002 functional capacity evaluation (FCE). The treatment note indicated continuing complaints of radiating leg pain bilaterally with some numbness and giving out on the right. Examination of the lumbar spine showed tenderness of the lower lumbar spine in the midline and left iliac crest, no sciatic nerve tenderness, extreme limitation of motion, positive straight leg raising and a slight decrease in sensation at the right medial thigh. Dr. Frank made no diagnosis or prescription.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Andrew P. Bush, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Bush examined appellant on July 25, 2002. On August 10, 2002 he

related her chief complaint, history of present illness (HPI) and findings on physical examination (PE). After reviewing appellant's medical records, Dr. Bush diagnosed subjective complaints of pain. He offered the following discussion:

"The claimant has multiple complaints of pain, dyesthesias and weakness that were inconsistent and did not follow anatomical/dermatomal distributions. Radicular symptoms must follow specific patterns and are consistent with pathology involving the lumbar spine. During the HPI it was obvious that the claimant frequently changed her description of the pain patterns that she was experiencing. Based on the records provided, initial complaints were for lumbar spine injury -- currently the claimant is complaining of lumbosacral spine and cervical spine pain. Also, the symptoms of bladder incontinence are also new. Both MRI [magnetic resonance imaging] scans were unremarkable -- the disc 'bulges' found are not clinically significant -- it has been reported in the Orthopedic and Medical Literature that there is up to a 60 percent incidence of disc bulging in individuals who are completely asymptomatic. These MRI scans cannot explain the bladder symptoms. The results from the FCE also indicated symptom magnification and a pain behavior. Based on the records provided and the HPI and PE performed it is my opinion that there is no active orthopedic condition present -- however, there is indication of a possible significant psychological component to the claimant's behavior and referral for further assessment and treatment is appropriate to assist the claimant to return to being a productive member of society."

Responding to questions posed by the Office, Dr. Bush reported no objective findings that the lumbar spine strain of May 24, 2001 was still active or that any current disability was related to the May 24, 2001 work injury. He stated that appellant's current condition could not be explained using an orthopedic/medical model. Although there were no orthopedic limitations on appellant for returning to her date-of-injury position, Dr. Bush reported that psychological evaluation and counseling would be appropriate before any return to work.

In a supplemental report dated September 27, 2002, Dr. Bush explained that, based on a medical model, strains that are appropriately treated and not reaggravated will resolve in 2 to 12 weeks. It was his opinion that the accepted condition of back strain had resolved.

On November 21, 2002 Dr. Frank reported that back pain is an orthopedic condition and that appellant continued to have significant back pain: "As Dr. Bush has pointed out, strains often resolve in [2] to [12] weeks and with [appellant] still having the subjective pain, there may be issues of deconditioning and/or psychological problems. I think with the persistent pain the work injury of May 24, 2001 has not resolved."

The Office found a conflict in medical opinion between Drs. Frank and Bush. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. T. Craig Derian, a Board-certified orthopedic surgeon, for a referee medical evaluation.

On February 5, 2003 Dr. Derian related appellant's chief complaint, history of present illness and findings on physical examination. He diagnosed major depression with panic attacks, inappropriate and/or abnormal illness behavior and cervical lumbar sprain/strain with multiple inconsistencies on examination. Responding to questions posed by the Office, Dr. Derian reported no objective medical findings that the lumbar spine sprain/strain of May 4, 2001 was an active condition causing objective symptoms. Appellant demonstrated multiple inconsistencies during evaluation and there were no findings of lumbar sprain/strain. Appellant's most recent MRI scan essentially demonstrated a structurally normal lumbar spine with very mild facet joint degeneration at L3-5 corresponding with age "and if anything, less than expected considering the patient's active work status during 15 years at the Durham VA Hospital." Dr. Derian stated that appellant could perform many of the duties of a registered nurse, but he recommended no lifting over 40 pounds and no lifting of patients. He stated:

"The patient's findings on examination are not consistent with lumbar spine strain/sprain but rather more consistent with inappropriate or abnormal illness behavior. Inappropriate or abnormal illness behavior is a conscious or unconscious or voluntary/involuntary response to evaluation and examination, in which a patient knowingly/unknowingly attempts to influence the examination or the opinion of the person performing the evaluation by limiting cooperation and by performing inconsistent activities during examination. The patient demonstrated gross inconsistencies during evaluation including voluntary inhibition of muscle function, abrupt behavior changes, pre and during and post examination as well as exaggerated description of symptoms."

Dr. Derian reported that appellant's findings were most consistent with severe psychiatric impairment consistent with probable major depression. While her psychiatric condition alone might significantly inhibit her return to work, "the patient does not appear to have objective findings on examination or on review of recent MRI scan of 1/03 to justify disability from work as a registered nurse, particularly in a modified position as discussed."

On March 21, 2003 Dr. Derian reported that the lumbar strain related to appellant's May 24, 2001 work injury had resolved.

On April 9, 2003 the Office issued a notice of proposed termination of compensation, proposing to terminate her compensation benefits because the weight of the medical evidence established that residuals of the May 24, 2001 work injury had resolved.

Appellant submitted a March 3, 2003 report from Dr. Erik Kinzie, a psychiatry resident, who acknowledged that appellant suffered a serious low back injury while working as a resident nurse in May 2001. He reported that since her injury appellant had developed a serious major depressive episode "which I think is a result of current physical disability and inability to maintain her past level of independence and employment." Dr. Kinzie recommended that appellant not return to work requiring intense mental activity or additional psychological stress.

Appellant also submitted a May 7, 2003 report from Dr. Nancy Lappenbusch, a licensed psychologist, who reported that she had been seeing appellant in therapy in order to alleviate some of the depressive/anxious symptoms, with which she was struggling since her injury. She

stated that appellant presented with an extreme depressive disorder “that appears secondary to her injury and the chronic pain that resulted.” Dr. Lappenbusch related appellant’s maladies and complaints and reported that it was essential that she receive pain management services as soon as possible. She referred appellant to a psychiatrist/internist who had experience with patients with depression and anxiety secondary to chronic pain.

In a decision dated May 19, 2003, the Office terminated appellant’s compensation benefits on the grounds stated in its notice of proposed termination. On the issue of appellant’s psychological condition, the Office found that Dr. Kinzie, as a psychiatry resident, was not a qualified physician and that Dr. Lappenbusch failed to provide an accurate factual or medical history or sufficient medical rationale.

The Board finds that the Office properly terminated appellant’s compensation benefits on the grounds that she no longer suffered from an injury-related lumbar strain.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>1</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup> In this case, the Office accepted that appellant sustained a lumbar strain on May 24, 2001 while lifting a patient at work. To justify the termination of compensation benefits, the Office must establish that appellant no longer suffers from that lumbar strain.

A conflict in medical opinion arose between appellant’s attending orthopedist, Dr. Frank and the second opinion orthopedist, Dr. Bush, on whether appellant continued to suffer from the accepted lumbar strain. Section 8123(a) of the Federal Employees’ Compensation Act provides in part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”<sup>3</sup>

To resolve the conflict in medical opinion between Drs. Frank and Bush, the Office referred appellant to Dr. Derian, a Board-certified orthopedic surgeon. The Office provided Dr. Derian with appellant’s medical record and a statement of accepted facts so that he could base his opinion on a complete and accurate history. Dr. Derian examined appellant and diagnosed major depression with panic attacks, inappropriate and/or abnormal illness behavior and cervical lumbar sprain/strain with multiple inconsistencies on examination. He reported no objective medical findings of lumbar sprain/strain. Appellant’s findings, he explained, were more consistent with inappropriate or abnormal illness behavior. She demonstrated gross inconsistencies during evaluation. Dr. Derian reported no objective findings on examination or on review of the most recent MRI scan to justify disability for work as a registered nurse. He concluded that the lumbar strain related to appellant’s May 24, 2001 work injury had resolved.

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>3</sup> 5 U.S.C. § 8123(a).

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to a referee medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>4</sup> The Board finds that Dr. Derian's opinion is based on a proper factual background and is sufficiently well rationalized that it represents the weight of the medical evidence and resolves the conflict in this case. As the Office has met its burden of proof to justify the termination of compensation benefits for the condition of lumbar strain, the Board will affirm the Office's May 19, 2003 decision.

The May 19, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 16, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).